A

CHAN KING YU

v.

PP

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RICHARD MALANJUM JCA
NIK HASHIM JCA
[CRIMINAL APPEAL NO: W-05-17-2002]

C

4 JULY 2006

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in methamphetamine - Appeal against conviction and sentence - Prima facie case - Mens rea possession - Whether trial judge correct in*

D

invoking and applying presumption under s. 37(da)

CRIMINAL PROCEDURE: *Appeal - Fact, finding of - Trial judge made findings of pure fact based on evidence he accepted as true - Whether appellate court must defer to views of trial judge*

E

This was an appeal by the appellant against his conviction on a charge of trafficking 9,103.9 grams of methamphetamine and his sentence to death by the High Court. The learned trial judge, based on the facts of the case, had ruled that a *prima facie* case of actual possession had been established under s. 37(da) of the

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Dangerous Drugs Act 1952 ('the Act'). At the conclusion of the case, the learned judge had held that the appellant had failed to raise a reasonable doubt as to the truth of the prosecution's case and had convicted him accordingly. The only argument advanced by the appellant in this appeal was that he had no *mens rea*

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possession and was, therefore, not guilty of the offence.

Held (dismissing the appeal, and affirming the appellant's conviction and sentence)
Per Gopal Sri Ram JCA:

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(1) On the facts, taking into account the combined strength of the individual strands of evidence in this case, there could be no doubt whatsoever that the appellant was aware of his possession of the drug, that he knew the nature of the drug he possessed and that he had the power of disposal over it.

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The appellant's overt acts certainly established these matters; in short, he had *mens rea* possession. The learned judge was

therefore entirely correct in invoking and applying the presumption under s. 37(da) of the Act in holding that the appellant had committed the offence of trafficking. (para 10)

(2) The learned judge, faced with a sharp conflict of oral evidence, had made findings of pure fact based on the evidence he had accepted as true. It was also obvious from a reading of his judgment as a whole that he had rejected the appellant's story as to the identity of the real culprit. In such a case, this court as an appellate court, must defer to the views of the trial judge who had seen and heard the witnesses. (para 11)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan perayu terhadap sabitan atas pertuduhan mengedar 9103.9 gram methamphetamine dan hukuman mati yang dijatuhkan oleh Mahkamah Tinggi ke atasnya. Berdasarkan fakta kes, yang arif hakim bicara merumuskan bahawa kes *prima facie* milikan sebenar di bawah s. 37(da) Akta Dadah Berbahaya 1952 ('Akta') telah berjaya dibuktikan. Seterusnya, di akhir kes pembelaan, yang arif hakim memutuskan bahawa perayu gagal membangkitkan keraguan munasabah terhadap kebenaran kes pendakwaan, sekaligus mensabitkannya. Di rayuan, satu-satu hujah yang dikemukakan perayu adalah bahawa beliau tidak mempunyai *mens rea* milikan dan dengan itu tidak bersalah terhadap pertuduhan.

Diputuskan (menolak rayuan dan mengesahkan sabitan dan hukuman)
Oleh Gopal Sri Ram HMR:

(1) Berdasarkan fakta, dan mengambil kira kekukuhan keterangan-keterangan individu pada keseluruhannya, tidak terdapat sebarang keraguan bahawa perayu sedar tentang pemilikan dadah, bahawa beliau mengetahui akan sifat dadah yang dimilikinya dan bahawa beliau mempunyai kuasa pelupusan terhadap dadah. Perbuatan perayu yang secara terang-terangan telah membuktikan semua ini; dalam ertikata lain, beliau mempunyai *mens rea* milikan. Yang arif hakim dengan itu betul sepenuhnya bilamana menggunapakai s. 37(da) Akta dan memutuskan bahawa perayu telah melakukan kesalahan mengedar.

(2) Berdepan dengan pertikaian keterangan lisan yang mendalam, yang arif hakim telah membuat dapatan-dapatan fakta berdasarkan keterangan yang diterimanya sebagai benar. Juga jelas dari keputusannya itu bahawa beliau telah menolak cerita perayu berkenaan identiti pesalah yang sebenar. Dalam halkeadaan sedemikian, mahkamah semasa, selaku mahkamah rayuan, harus menghormati pandangan hakim bicara yang telah melihat dan mendengar saksi-saksi.

Case(s) referred to:
Chan Chwen Kong v. PP [1962] MLJ 307 ***(foll)***
Saad Ibrahim v. PP [1968] 1 MLJ 158 ***(foll)***
Andy Bagindah v. PP [2000] 3 CLJ 289 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 37(da)

For the appellant - Gurbachan Singh; M/s Bachan & Kartar
For the respondent - Awang Armadajaya Awang Mahmud

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-16-2001]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] The appellant was convicted by the High Court at Kuala Lumpur on a charge of trafficking 9,103.9 gm of methamphetamine and was sentenced to death. He appealed to us against his conviction and sentence. We dismissed his appeal. The reasons for our decision are now produced. First the facts.

[2] On the morning of 19 June 2000 ASP Giam Kar Hoon (PW7) from the Narcotics Division of Bukit Aman received information that a Chinese male from Hong Kong by the name of Chan King Yu would be trafficking in a dangerous drug at a hotel in Kuala Lumpur on that very day. Acting on that information PW7 assembled a team of police personnel. Among the team were Shamsuddin Jantan (PW4) and Lance Corporal Abdul Halim Basri (PW5). At about noon on the same day, PW7 received further information that the hotel at which the offence was to be committed was the Hotel Nova at Bukit Bintang. He at once despatched PW4 and one Detective Corporal Teoh to the Hotel

to conduct a surveillance of the appellant. On arrival at the scene, PW4 remained in his car which he parked close to the entrance of the hotel. At about 12.25pm he saw the appellant emerging from the hotel. The appellant was alone. He carried a sling bag. PW4 recognised the appellant from a photograph given him by PW7. The appellant walked into Bukit Bintang Plaza, a well known shopping complex in Kuala Lumpur. When the accused emerged from the Plaza, he was seen carrying a new suitcase (Exh P12) which bore the brand name "Polo" The appellant then returned to the hotel. He went into Room 1303 on the 13th floor. Then, at about 5.50pm, the appellant once again emerged from the hotel. He was alone. He walked onto the street and disappeared in the crowd. He returned to the hotel at about 7.20pm. He came in a taxi. After he had descended from the taxicab, the appellant removed three plastic bags from the trunk of the vehicle. Having paid off the taxi the appellant re-entered the hotel. He carried the plastic bags with him. He took the lift to the 13th floor. The appellant re-emerged about 5 or 10 minutes later. He carried a plastic bag (exh. P24) which he placed in a dustbin near the hotel. He then walked away. Exhibit P24 was recovered almost at once by PW4. It bore the words "Tang's Sale Of The Year". Inside it was a metal lid, tin foil, a card bearing the words "Santa Barbara Polo & Racquet Club" and another card with the word "Tongwu" printed on it. At about 7.20pm a police ambush party arrived at the hotel and took their positions on the staircase landing on the 13th floor.

[3] The appellant returned to the hotel at about 8.50pm and went into Room 1303. A little later, PW7 meanwhile on the 13th floor, after being alerted of the appellant's arrival, PW7 and the ambush party waited for the appellant. After a while, PW7 and his team having failed to gain entry into the room even with the assistance of the hotel's staff knocked on the door and introduced himself as a police officer. The appellant then opened the door. The room and bathroom were searched. Several items were recovered. On a table beside the bed was a small packet of transparent plastic containing what proved on subsequent chemical examination to be methamphetamine. The sling bag which the appellant had carried with him earlier that day was found to contain the appellant's personal belongings as well as his travel documents and air tickets. Also seized was exh. P12. Inside P12 were three plastic bags. Each of these plastic bags contained a cylinder wrapped in tin foil. Each cylinder had within it four small

parcels wrapped in carbon paper and sponges. All the parcels that were recovered contained a white crystalline substance which subsequent chemical analysis showed to be methamphetamine, a drug proscribed by the Dangerous Drugs Act 1952 ("the Act"). The appellant was arrested and later charged. Based on the foregoing facts the learned judge ruled that a *prima facie* case of actual possession had been established under s. 37(da) of the Act. He then called upon the appellant to make his defence.

[4] The gist of the appellant's defence which he made on oath is that he had been sent by his employer in Hong Kong, one Michael Chan to collect money from the latter's client. On the appellant's arrival at the airport at Kuala Lumpur he was met by one Man Chai, one of Michael Chan's clients. He was told by Man Chai to collect some tools which the appellant did. He denied placing the plastic bags inside the POLO suitcase. He claimed that the policemen had done that. He denied any knowledge of the drugs in the cylinders. He denied that the small packet of drugs found on the bed side table was his. He also denied that he threw exh. P24 into the dustbin. He said that the plastic bags and their contents belonged to Man Chai who was supposed to come to the hotel and collect it.

[5] At the conclusion of the whole case the learned judge held that the appellant had failed to raise a reasonable doubt as to the truth of the prosecution's case. He accordingly convicted the appellant.

[6] Before us no challenge was taken as to the findings of the learned trial judge on the nature of the drug after chemical analysis and its weight. The only argument advanced in the appeal was that the appellant had no *mens rea* possession and was therefore not guilty of the offence. This submission requires a consideration of the evidence. But, before we address our minds to the evidence, we must hearken to the law, in particular, what the prosecution has to prove to establish its case. Essentially it must, for present purposes, prove that the appellant had, what is termed, "*mens rea* possession". It is only then can it prove that the appellant was "found in possession" within s. 37(da) of the Act.

[7] "*Mens rea* possession" was explained by Yong J in *Saad bin Ibrahim v. Public Prosecutor* [1968] 1 MLJ 158 in a passage that has been repeatedly applied with approval:

> In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

[8] Whether the prosecution has established *mens rea* possession in a given case is a question of fact depending on the facts and circumstances of each case. Proof of knowledge in a criminal case is, short of a voluntary confession by an accused, like many other states of a guilty mind in a criminal case, a fact to be gathered inferentially from proved facts and surrounding circumstances. In particular the acts done by an accused and other circumstances provide valuable assistance to a court in determining whether that accused had the requisite *mens rea*. It is in reality a commonsense approach.

[9] Now, what is the evidence in this case from which *mens rea* possession may be inferred? First, there is the evidence that he arrived from Hong Kong on 12 June 2000. And his ticket shows that he was scheduled to return there on 22 June 2000. Second, when arrested on 19 June 2000 a very large quantity of methamphetamine is found in the hotel room of which he was the sole occupant. Third, he was seen bringing into his room the three plastic bags which had the cylinders containing the drug in question. Fourth, he disposed of the plastic bag (exh. P24) into a garbage can. He denies this. But what possible motive could there be for PW4 to make up this part of his evidence? He was a policeman assigned to keep watch over the appellant's movements at and about the hotel. He did just that. And he told the court what he saw. So the judge was quite correct in accepting PW4 as a truthful witness and in acting upon his evidence. The appellant's overt act of disposing of exh. P24 shows that he was exercising dominion over the contents of that bag, all of which came from his room. Fifth, there is the plastic packet on the bedside table containing the proscribed drug in question. Sixth, there is the act of the appellant purchasing the large Polo suitcase when he already had one in his room. Seventh, there is the unexplained delay by the appellant to open the door to his room taken together with inability of the police to get the door open even with the assistance of the hotel staff. The appellant gave no

explanation for his conduct in this respect, especially the long delay on his part. Each of these circumstances when taken alone may be insufficient to prove *mens rea* possession. But that is not the test to be applied to circumstantial evidence. The true test is that laid down by Thomson CJ in *Chan Chwen Kong v. Public Prosecutor* [1962] MLJ 307 as follows:

> '... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to form a rope. The real question is: is that rope strong enough to hang the prisoner?

[10] Taking into account the combined strength of the individual strands of evidence in this case, there can be no doubt whatsoever that the appellant was aware of his possession of the drug, that he knew the nature of drug he possessed and that he had the power of disposal over it. The overt acts of the appellant certainly establish these matters. In short, the appellant had *mens rea* possession. The learned judge was therefore entirely correct in invoking and applying the presumption under s. 37(da) of the Act and in holding that the appellant had committed the offence of trafficking.

[11] There is an added feature in this case. Here, the learned judge was faced with a sharp conflict of oral evidence. He made findings of pure fact based on the evidence he accepted as true. It is also obvious from a reading of his judgment as a whole that he rejected the appellant's story that Man Chai was the real culprit. In such a case as this we as an appellate court must defer to the views of the trial judge who had seen and heard the witnesses. See, *Andy bin Bagindah v. Public Prosecutor* [2000] 3 CLJ 289.

[12] For the reasons already given we found no merit in the appeal and dismissed it. The appellant's conviction and sentence were affirmed.